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Postnational Constitutionalism and the Challenge of Contested Multilateralism

Neil Walker

Julia Morse and Robert Keohane's recently minted idea of 'contested multilateralism' (Morse and Keohane, 2014) is not directly addressed to those interested in the kind of theory and practice of constitutionalism beyond the state ('postnational constitutionalism' for short) that the journal *Global Constitutionalism* has made its mission to map and encourage. Yet contested multiculturalism deserves the close attention of this journal's readers and contributors for providing a novel account of the dynamics of growth in precisely the kinds of international and transnational institutions that they have sought to conceptualise in constitutional terms. It is my argument that, through this novel account, contested multilateralism offers both a serious challenge and qualified encouragement to postnational constitutionalism, and that we only appreciate the full value of its approach if we hold both of these perspectives – critical and constructive – together.

1. *The trend towards contested multilateralism*

Let me begin my discussion by looking at the kind of concept 'contested multilateralism' is, and noting its strengths and weaknesses. As defined by Morse and Keohane, contested multilateralism offers a capsule description of the situation that occurs when national and transnational actors use new or existing multilateral institutions to challenge those rules, practices or aims of other existing multilateral institutions with which they are dissatisfied. Contested multilateralism, at least in its early form, is not the host of a well-developed explanatory, predictive or normative theory. It describes what the authors understand to be an intensifying contemporary trend, but we are not offered any accompanying general analysis of

what has caused that trend, or of where that trend is likely to take us in the long run. Neither does the elaboration of the concept involve a claim that the trend is categorically - or even predominantly - a welcome or an unwelcome one according to the standards by which we should evaluate global governance.

In fact, the trend embraces such a wide range of phenomena that it would be difficult to envisage its being the kind of thing that is even amenable to a single such general explanation, or set of projections, or framework of evaluation. Contested multilateralism covers both the development of new institutions to challenge the institutional *status quo* - what the authors call 'competitive regime creation' - and the switch of focus by a coalition of actors to an alternative multilateral forum - what the authors call 'regime shifting'. It also covers a wide diversity of issue areas, from intellectual property to renewable energy, health and international security. It has different generative sources, both state-based and international institution-based. And it is brought to fruition through different sites and actors, from international legal conventions and formal organisations to informal networks, including civil society organisations and coalitions.

So the trend with which Morse and Keohane are concerned is a broad and diverse one, and that very breadth and diversity offers disadvantage as well as advantage. The disadvantage, as already indicated, lies in the absence of any core or paradigm case that might provide the basis of a robust explanatory or evaluative theory. The advantage lies in the discerning capture of so many different developments under one very general tendency. And while there may be no close investigation of deep causes, the authors do suggest here, and develop more explicitly in other writings, (see e.g. de Burca, Keohane and Sabel, 2013) that the trend towards contested multilateralism both tracks and reinforces a broad drift away from the hegemony of the sectorally integrated regimes that grew up alongside the UN in the early post-war period, such as the Bretton Woods Institutions and the World Health Organisation. The relative success of

these integrated regimes owed much to the dominant position of certain leading states, or state coalitions, and their projected commitment to providing a coherent response to clearly specified problems of global collective action. However, as the number of issue areas in which global public goods have become visible on the international political radar has multiplied, and as their complexity has deepened, the limitation of this kind of linear, settled, state-delegation model has become more exposed - a challenge reinforced by the amplification of the voice of the global South in the UN and other planetary political settings and their willingness to articulate different preferences to rich Northern powers. The arrested development of major integrated global initiatives of the last 20 years, from the failure of the WTO's Doha Development Round, to the halting ratification and implementation of the Rio Convention on Climate Change and the Rome Statute establishing the International Criminal Court, shows an increasing failure to deliver - or even when delivered to consolidate - grand settlement across significant interest divisions and across the broader set of sovereign states who assert a significant stake in these developments.

Instead, as Morse and Keohane's instructive case studies indicate, the response to increased global interdependence in contentious policy areas has been the upsetting of settled institutional hierarchies and their replacement by less coherent and more heterarchical regime complexes. In arenas as diverse as the GATT/WTO challenge to the World Intellectual Property Organisation over patent protection, the EU's opposition to the UN Security Council's system for sanctioning terrorist finance, the launch of the International Renewable Energy Association to outflank the International Energy Agency on the development of renewable energies, and the emergence of a coalition of non-state organisations to rival the WHO on questions on vaccination and to pursue a more holistic socio-economic conception of global health, we observe the institutional proliferation through competition that lies at the heart of contested multilateralism. This is a process, moreover, that builds on itself. As institutional

density and overlap increases due to contestation, this provides scope for further contestation and new forms of institutional elaboration, and so on in an ever-intensifying flow.

2. Postnational constitutionalism in question

If contested multilateralism is a concept already widely drawn, postnational constitutionalism inhabits decidedly more open-ended terrain. All that unites the variety of different conceptions of postnational constitutionalism is subscription to two very broad claims. One claim is normative, holding that constitutionally valuable processes and outcomes are conceivable beyond the state, and so our contemplation of the prospect of such valuable processes and outcomes should not be confined to the state. The other claim is empirical, holding that the exercise of effective constitutional authority is not in fact restricted to states and state institutions. The two claims are normally run together by their proponents against the insistence of postnational constitutional sceptics that constitutional authority both should be and is a matter for sovereign states alone.

Yet within this twin-track approach, there are differences. Some conceptions of postnational constitutionalism, as we shall see, accord an explicit priority to the normative claim – what ought to be rather than what is – and track the latter only in terms of the former, whereas other conceptions more readily concede the empirical as their point of departure. Both orientations respond in different ways to an abiding difficulty in connecting the ideal to the actual in transnational constitutional thought. Those who emphasise the ideal over the actual may be concerned about the limitations of existing transnational constitutional arrangements, and keen to look beyond these to more hopeful signs or emergent trends. Those who begin from the actual, by contrast, tend to be wary of the lack of grounding of certain of the stronger normative claims for postnational constitutionalism in current international power relations. But this also reveals an ideological preference – a pragmatic acceptance of ‘non-ideal’

constitutional circumstances as they are and a commitment to making the best of them. All postnational constitutionalists, then, remain concerned in one way or another with the assessment and attainment of what is constitutionally valuable, and in achieving, from one direction or the other, some kind of reconciliation between the ideal and the actual. But the tensions involved in reaching for this accommodation are never far from the surface

We better understand how these tensions are differently perceived and addressed, and we better appreciate the sheer range of positions that can be accommodated under a thin state-decentring consensus, if we focus upon the divergent viewpoints amongst postnational constitutionalists in their prior assessment of what may be defined as constitutional. This is an assessment that typically blends inquiry into etymological roots and historical usage with deep assumptions about the proper nature of *any* constitutional project - and therefore, over what counts as a relevant empirical instance or an appropriate articulation of postnational constitutionalism. The deep differences that emerge over this prior conceptual question allow us to identify three broad strands of global constitutionalism.

First, we find versions of global or transnational constitutionalism which, following the long tradition of reference to a discrete 'constituted' object of self-government, stress singularity of normative order, architectural integrity and the existence of some kind of integrated transnational or global constitutional system, however rudimentary. Secondly, there is a plural conception of transnational constitutional thought and practice, where the emphasis is on sector-specific self-governing regimes with quite different constitutive dynamics and regulatory forms. Here the emphasis is again on the particularity of the constituted object. But in marked contrast to the first approach, this world of postnational constitutionalism, just like the world of national constitutionalism that preceded it and continues to exist alongside it, is conceived of as a highly segmented and differentiated arrangement of largely self-contained functional or territorial units. Alongside these two approaches we find, finally, a stream of

transnational constitutionalism focused not on the detail of actually existing structures but on the development of common constitutional values, principles or mechanisms bearing upon governing capacity or constraint, and in a manner that – in accordance with another aspect of the older constitutional tradition - is general or universal in ambition, and so trans-institutional and polity-indifferent.

There is no space here to examine these three strands – postnational constitutionalism as *singularity*, *plurality* or *commonality* - in any depth (Walker, 2015, ch.3). Yet each has certain salient characteristics, which, as we shall see, are challenged by the view of transnational governance offered by contested multilateralism. Adapting the pyramidal structure of national constitutionalism to the global domain, postnational constitutionalism as singularity tends to be organized around the commanding heights of the UN Charter and institutions. In addition, the notion of an ‘international community’ figures prominently in this drama, with the San Francisco conference which drafted the Charter cast as a kind of constitutional convention in which that international community is mobilized and crystallized as a global constituent power – ‘We The Peoples of the United Nations’ (Fassbender, 2008). A more elaborate and expansive version of the singular approach to postnational constitutionalism has also gained some support. This places less store by the functional capacity of the UN and places greater emphasis on its role as an authoritative ‘connecting factor’ (De Wet, 20012; 1224) within a more broadly inclusive framework of international law.

If we continue along this spectrum, we arrive at the alternative model of postnational constitutionalism as plurality. Here attention is focused upon the global spread of ‘sectoral constitutionalisation’ (Peters, 2009), with particular reference to the structural similarity and cross-cloning of the hybrid ‘treaty-constitutions’ (Jackson, 2010) of special international organisations or regimes such as the International Labour Organization, the WTO or the

uniquely well-developed case of the EU. And at the very extreme of this continuum, we find a conception of ‘societal constitutionalism’ (Teubner, 2012) in which the division of the world into a multiplicity of functional regimes is even more pronounced. This characterization has less to do with formal juridical attributes (constitutions, treaties, appellate courts, etc.) and more to do with how law bends, mutates and blends in various ways (through industry codes, performance indicators, rating agencies, hybrid private/public representative institutions, arbitration and mediation forums, etc.) with the distinctive operating logic of differently constituted transnational social fields – the economy, sport, the arts, education, science, communications media etc.

Postnational constitutionalism as commonality finds the essence of constitutionalism not in the workings of particular governance institutions, whether in a centralized hierarchy or in a more baroque pattern, but in the articulation of certain key norms both across, and - in the context of ‘pluralist’ exchanges - between different constitutional sites, (see e.g. Walker, 2002). These common norms may assume the status of formal doctrine, however precariously institutionalized, as in the general principles of international law; or as in the case of *ius cogens* prohibitions of aggressive war, genocide, piracy, slavery, torture or apartheid, and affirmations of the right to national self-determination and to permanent sovereignty over natural resources. Yet some versions of the common principles approach place as much if not more stress on informal or implicit common standards of good governance, such as legality, subsidiarity, adequate participation and accountability, public reason and the protection of fundamental rights, and on how these are affirmed, developed and reinforced in circulation between different constitutional sites –national and transnational (see e.g. Kumm, 2009).

The three strands of postnational constitutionalism are by no means mutually exclusive. It is possible to note the importance of the UN, reinforced in a post-Cold War climate of the

partial collectivization of global security enforcement, while also registering the broader trend to differentiation and specialization in the rise of sectoral constitutionalism at non-state sites. And it is possible to acknowledge both of these trends towards institutional empowerment while also appreciating a trend towards the articulation of common norms across institutions and a more conscious and confident practice of cross-site borrowing, learning and endorsement. Each strand can be seen as part of a cumulative movement away from a state-centred constitutionalism as much as it can a force at variance with the others.

Yet this should not blind us to the real tensions both within and across the three strands. Each strand, as intimated earlier, struggles with the gap between the actual and the ideal – between fact and norm. Both constitutionalism as singularity and constitutionalism as plurality tend to start from existing institutional patterns and to provide such rationalisations and justifications of these patterns as they can. Constitutionalism as commonality and aspiration towards generality is more likely to start from the ideal and look for its instantiation, however partial, in doctrine and practice.

We also find discordance between the visions of singularity and pluralism. Regional government in the EU can clash with global governance at the UN. The operational ambitions of NATO or other coalitions of the willing are often at odds with what is possible, or not possible, in the UN Security Council. The regime of economic governance of the WTO sits uneasily with the UN's broader development goals. In turn, the fragmentary impulse we find in constitutionalism as plurality is also in tension with at least some versions of constitutionalism as commonality. The longstanding debate over unity versus fragmentation in international law, for example, which has been joined in such key settings as the International Law Commission, (2006) concerns precisely whether some kind of general normative order can hold the centre against the pull towards self-regulating and self-contained regimes

3. *The Challenge of Contested Multilateralism*

How, if at all, can Morse and Keohane's contested multilateralism aid us in coming to terms with the weaknesses and strengths of the postnational constitutional approach? It can do so, I contend, both by challenging the empirical credentials of much that passes under the banner of postnational constitutionalism, and, on the basis of that challenge, suggesting how postnational constitutionalism might find a better accommodation between the factual and the normative.

To begin with, the argument from contested multilateralism helps us appreciate that, whatever else it is, postnational constitutionalism is often just bad social science. Postnational constitutionalists put at the centre of their institutional accounts a concept whose meaning is contested on evaluative grounds and, in addition, whose translation from its state domicile is bound to be imprecise. While some stress that part of constitutional meaning and heritage that is concerned with the effective operation of particular goal-orientated institutions of self-government, others stress certain supposedly general but abstract goods of political community and of individual autonomy and well-being. And in either case, the analogy drawn between constitutional forms and norms understood and *experienced* as such in the national arena and those typically merely *attributed* to the transnational arena by an institutional elite and an academic commentariat is tendentious or awkward. The narratives constructed under the different strands of postnational constitutionalism, in short, tend to be highly selective, a function of the different focal interests of the narrators, including their different normative orientations, rather than of the disinterested pursuit of a comprehensive account of the global institutional configuration.

We should not be naïve about this. Of course, *every* account of empirical phenomena is selective, including the account provided under the banner of contested multilateralism. Yet there are important differences between the explanatory credentials of an approach, such as

contested multilateralism, whose selectivity in finding and scrutinizing the data is purely a function of a prior explanatory insight into the moving forces of transnational institutional life, and those of an approach, such as postnational constitutionalism, whose selectivity of inquiry is a function of a particular and inevitably contested understanding of an appraisive concept. And what is not in doubt is that the perspective of contested multilateralism highlights how each of the three strands of postnational constitutionalism we have introduced provides an unhelpfully partial and skewed picture of postnational governance.

This charge of partiality is most obviously true of the singular conception of postnational constitutionalism as an UN-centred hierarchy. Contested multilateralism paints a very different picture, much more decentred, much less organized around consensus. Yet we should resist the temptation to read too much into this - to see this obvious contrast as evidence of a fundamental irreconcilability between contested multilateralism and postnational constitutionalism. The singular conception, after all, is only one strand, even if it is the strand that provides the most convenient caricature of postnational hubris amongst state-centred transnational constitutional sceptics.

Yet contested multilateralism is also likely to be critical of the selectivity of the other approaches. Postnational constitutionalism as commonality, by bracketing off institutional particularity in search of normative generality, is prone to marginalize an important dimension of power asymmetry and of conflict and contestation in postnational governance. For its part, postnational constitutionalism as plurality clearly has most in common with the highly differentiated perspective of contested multilateralism. But even here there are important areas of difference. Whereas the emphasis of sectoral and even societal constitutionalism tends to be on the relative integrity of the parts, and on how this both contrast with and contributes to the difficulty of their combination, contested multilateralism is also closely concerned with the

divisions, conflicts and creative contestations *within* each of the sectors.

But if contested multilateralism offers a telling empirical critique of postnational constitutionalism, when taken further that same critique allows contested multilateralism to provide new and potentially constructive insights into some of the normative difficulties associated with the constitutional project. Let us recall that postnational constitutionalism's explicitly normative orientation, as well as accounting for its internal diversity and for its inadequacies as explanatory social science, also establishes a tension between the ideal and the actual that its authors struggle to accommodate. Contested multilateralism can help with this struggle in a number of related ways.

To begin with, contested multilateralism offers a striking reminder of how much the transformation of international regimes and regime complexes remains within the agency of states or other actors who do not inhabit roles within existing constitutionalised frameworks of global governance. Morse and Keohane, as noted, draw a distinction between state-led and institution-led activity in the areas of regime shifting and regime creation alike. It is already a helpful corrective to the widely assumed view that the progressive constitutionalisation of transnational governance is most likely to come from transnational sources and to be required to prevail against state-centred resistance, to be reminded that individual states, and, in particular coalitions of states, are often behind such new or reform initiatives. The involvement of many Western countries in contesting the conservative authority of the IEA in the creation of renewable energy sources through the creation of IRENA is a case in point, as is the authors' other example of the US-led development of the Proliferation Security Initiative to overcome the limitations of the maritime interdiction practices available under the UN Convention on the Law of the Sea. And even when non-state-derived, a consideration of the kinds of entities involved shows that the impulse to change is often exogenous to the existing governance

complex. The global challenge to WHO on matters of vaccination, for example, was led by a coalition of civil society organisations, public health advocates and some parts of the vaccine industry. Here, indeed, Morse and Keohane's view recalls the broader importance of bottom-up, transnational 'contestatory constitutionalism' recently argued for in *Global Constitutionalism's* own editorial pages (Tully et al, 2016).

We should not assume, of course, that all state-led or other non-endogenous development of the transnational institutional complex will be in a direction that would generally be considered constitutionally progressive in terms of its specification and pursuit of public goods and its articulation of standards of open, responsive and rights-protecting government. We note, for instance, that such proposals still emanate disproportionately from the global North, and that powerful national interests can still be given undue prominence in new coalitions. Nevertheless, contested multilateralism does challenge the assumption that the constitutionalisation of global governance is largely an endogenous matter; and, crucially, in so doing it also challenges the view that the will to push in a constitutional direction lies largely with existing transnational institutions who often lack the capacity and broad mandate to do so – a view that would lead its holders to expect normative aspiration to be regularly frustrated by facts on the ground.

There is, finally, a broader methodological reason why contested multilateralism offers some release from postnational constitutionalism's fact-value tension. One of the particular ways in which the normative preoccupation of postnational constitutionalism can produce bad social science is by encouraging an unduly static approach to its subject-matter. On the one hand, as we have seen, a preoccupation with the sponsorship of key constitutional values can lead to institutional inattention, to an unwillingness to dwell on the detail of power relations, and so to a lack of curiosity over how these might be changed or changing. On the other hand,

for those who do put actual existing institutions front and centre, as one critic has argued, there is a tendency, encouraged by the perhaps wishful adoption of a constitutional mindset and a vision borrowed from the national stage, to overstatement - an assumption that the new transnational world is 'already constituted, structured, governed' and that 'we simply lack the vision to understand how it works.' (Kennedy, 2009: 39).

What is missing from both these approaches is a sense of constitutional dynamics - a diachronic analysis to supplement the freeze-frame picture. With its conception of change through creative disruption, contested multilateralism reminds us of this more dynamic approach. In so doing, it provides us with one way of imagining and plotting the kind of developments that might provoke the movement of the constitutional actual in the direction of the ideal, rather than simply producing an idealized picture of the actual.

Contested multilateralism, in conclusion, remains a concept under construction, and so one that may lack the detailed specification for sophisticated causal theorization. It too, therefore, may not - or may not yet - provide the best social science. But it is precisely the broad sweep of its initial message that offers something interesting and challenging to the multiverse of contemporary postnational constitutionalism.

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